Filed 2/4/19 In re Frank F. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re FRANK F., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. FRANK F., Defendant and Appellant.	G055231 (Super. Ct. No. 16DL1150) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Lewis W. Clapp, Judge. Reversed and remanded with directions. Request for judicial notice. Denied.

Aurora Elizabeth Bewicke, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Adrian R. Contreras, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Frank F. (the minor) admitted committing vandalism and possessing graffiti tools. On appeal, the minor challenges the juvenile court's order denying his motion to suppress evidence and the court's order denying his *Pitchess* motion.[1]

Given the totality of the circumstances, we conclude the minor's encounter with the police was consensual and not a detention. The seizure of a spray paint can discarded by the minor was therefore not subject to Fourth Amendment scrutiny, and the juvenile court did not err in denying the motion to suppress.

Having reviewed the sealed records of the juvenile court's in camera hearing, we conclude those records do not establish that the court actually reviewed the documents in question. Therefore, we reverse and remand the matter for a new *Pitchess* motion hearing. If, after the hearing, the court determines there is no information to be disclosed to the defense, the adjudication and disposition order shall be reinstated.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

At about 10:15 p.m. on February 12, 2016, four Anaheim Police Department officers in a patrol car saw the minor and another male Hispanic walking through a restaurant parking lot. Fifteen to twenty minutes later, the officers returned and saw the minor and the other male in the same area. Officer Jason Smith testified he initiated a stop to ensure the two were not involved in criminal activity, and to enforce the 10:30 p.m. curfew for minors. Smith pulled in and parked the patrol car 10 to 15 yards from the minor and the other male; the headlights and a spotlight were pointed at

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[1] In *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 535 (*Pitchess*), the California Supreme Court held that a criminal defendant has a right to limited discovery of the personnel records of peace officers in order to ensure "a fair trial and an intelligent defense in light of all relevant and reasonably accessible information." The Legislature later codified the privileges and procedures of such so-called *Pitchess* motions. (Evid. Code, §§ 1043-1045; Pen. Code, §§ 832.7, 832.8.)

them. The two stopped. All four officers exited the patrol car and approached the pair. Each of the four officers had a gun and a Taser attached to his waistband, but none had a weapon in his hand.

The minor stopped walking and turned to face the officers with a "startled look" on his face. The minor pulled a can of spray paint from his rear pants pocket and dropped it on the ground. The minor was detained for possession of graffiti tools.

One officer checked the area and located fresh graffiti on a nearby wall. The minor stated that he had tagged something. The estimated cost of removal of the graffiti was more than $400.

A judicial wardship petition alleged jurisdiction under Welfare and Institutions Code section 602 based on vandalism (Pen. Code, § 594, subds. (a) & (b)(1)) and possession of graffiti tools (*id.*, § 594.2, subd. (a)).

The minor filed a *Pitchess* motion asking the juvenile court to review the personnel files of the four arresting officers for "evidence of misconduct." The court granted the minor's request for an in camera review of the personnel files. Transcripts of the in camera proceedings were ordered sealed, and the Anaheim City Attorney was ordered to prepare a list of the items inspected by the juvenile court. The court found that none of the records was "material to the subject matter in our pending litigation" and did not order any files turned over to the defense.

The minor filed a motion to suppress evidence obtained as the result of an unlawful detention. (Welf. & Inst. Code, § 700.1.) Following a hearing, the juvenile court denied the motion to suppress.

The minor then waived his constitutional rights, admitted the allegations of the wardship petition, and entered into a disposition agreement. As a factual basis for his admission, the minor stipulated: "I did maliciously & unlawfully deface[] with graffiti a wall, property of another in [an] amount of $400 or more; I also possessed a marking substance with intent to commit vandalism." The juvenile court admitted the disposition

agreement into evidence, found there was a factual basis for the plea, and declared the minor to be a ward of the court. The court placed the minor on probation. The minor timely filed a notice of appeal.

DISCUSSION

I.

MOTION TO SUPPRESS

In reviewing the juvenile court's denial of the motion to suppress evidence, we uphold all factual findings by the court, whether express or implied, that are supported by substantial evidence, but independently assess whether the challenged search or seizure was constitutional, based on those facts. (*People v. Hughes* (2002) 27 Cal.4th 287, 327.)

The juvenile court found that, until the point when the minor discarded the spray paint can, there was no detention. "[I]n this case you are saying that there was a detention immediately upon the officers parking with headlights on the minor and exiting their vehicle, and so at this point at that particular moment the court doesn't believe he had yet been detained. Nobody had yelled at him to stop. Nobody had ordered him to stop. He simply was I think startled or surprised at seeing the vehicle pull up and four officers exit the vehicle. [¶] . . . [A] temporary detention occurs when in view of all of the circumstances a reasonable person would have believed that he was not free to leave. [¶] . . . [T]he argument from the defense would be that when an officer—when a vehicle pulls up with the lights on and shining on you and four officers get out, would you feel that you are not free to leave and so that might be the case, but I don't see it as being at that point a detention. [¶] The minor may have not felt free to leave, but he is not being detained yet. He could still turn and walk away."

The juvenile court further found that when the minor dropped the spray paint can, the police had a reasonable suspicion to detain the minor. "[A]t the time of the

abandonment of the paint, the court feels that there was not a detention at that point and when the paint was discarded voluntarily by the accused, then there is certainly at that point . . . a reasonable suspicion to detain because now they are in a high crime area where there has been vandalism and they see a paint can being dropped by a couple of minors who are still in an area where it is unclear why they are hanging around in this area."

"'A seizure occurs whenever a police officer "by means of physical force or show of authority" restrains the liberty of a person to walk away.'" (*People v. Celis* (2004) 33 Cal.4th 667, 673.) The relevant test is whether, under the totality of the circumstances, """the police conduct would have communicated to a reasonable person that the person was not free to . . . terminate the encounter."""" (*People v. Garry* (2007) 156 Cal.App.4th 1100, 1106.)

"Police contacts with individuals may be placed into three broad categories ranging from the least to the most intrusive: consensual encounters that result in no restraint of liberty whatsoever; detentions, which are seizures of an individual that are strictly limited in duration, scope, and purpose; and formal arrests or comparable restraints on an individual's liberty. [Citations.] Our present inquiry concerns the distinction between consensual encounters and detentions. Consensual encounters do not trigger Fourth Amendment scrutiny. [Citation.] Unlike detentions, they require no articulable suspicion that the person has committed or is about to commit a crime. [Citation.] [¶] The United States Supreme Court has made it clear that a detention does not occur when a police officer merely approaches an individual on the street and asks a few questions. [Citation.] As long as a reasonable person would feel free to disregard the police and go about his or her business, the encounter is consensual and no reasonable suspicion is required on the part of the officer. Only when the officer, by means of physical force or show of authority, in some manner restrains the individual's liberty, does a seizure occur. [Citations.] '[I]n order to determine whether a particular encounter

constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter.' [Citation.] This test assesses the coercive effect of police conduct as a whole, rather than emphasizing particular details of that conduct in isolation. [Citation.] Circumstances establishing a seizure might include any of the following: the presence of several officers, an officer's display of a weapon, some physical touching of the person, or the use of language or of a tone of voice indicating that compliance with the officer's request might be compelled. [Citations.] The officer's uncommunicated state of mind and the individual citizen's subjective belief are irrelevant in assessing whether a seizure triggering Fourth Amendment scrutiny has occurred." (*In re Manuel G.* (1997) 16 Cal.4th 805, 821.)

The time period which we are analyzing is extremely short—would a reasonable person in the minor's place have believed he was not free to leave from the moment he was "startled" to see the police officers to the moment when he dropped the spray paint can? As did the juvenile court, we conclude that the answer to that question is no.

The patrol car pulled in and parked 10 to 15 yards from the minor. The headlights were on the minor, but the overhead lights had not been turned on.[2] The minor and the other male, who were walking away from the direction in which the officers approached, stopped walking, and the minor turned his head toward the officers. The four officers exited the patrol car, but none spoke to the minor and none had a hand on his weapon. As the officers were approaching at a normal pace, the minor turned to fully face them. Once Smith had approached him, the minor dropped the spray paint can. Given the totality of the circumstances, we conclude the minor did not reasonably believe

[2] Smith was unable to recall whether the patrol car's spotlight was or was not turned on.

he was detained between the time he registered the presence of the officers and the time he dropped the spray paint can.

The minor argues the appropriate standard to be applied is whether a reasonable 15-year-old Hispanic male would have felt free to leave. The law is clear that while factors such as age and race may be relevant to the totality of the circumstances analysis, they are not properly used to create a new and different standard based on the specifics of each defendant. (*United States v. Mendenhall* (1980) 446 U.S. 544, 558 [the defendant's age, education, sex, and race "were not irrelevant [but] neither were they decisive"; finding that the defendant voluntarily consented to accompany agents to DEA office was supported by the evidence, although the defendant had already been questioned by agents and agents briefly took her identification and plane ticket]; *In re J.G.* (2014) 228 Cal.App.4th 402, 411-412 ["a reasonable person in J.G.'s position would not have felt free to go regardless of his or her age"; encounter was consensual despite officer's request to speak with the minor, request to search the minor, and request for identification, name, and birthdate; encounter became a detention when the officer then asked the minor to sit on the curb, after two more patrol cars and three more uniformed officers, one of whom was carrying a rifle, arrive at the scene].)

The Attorney General argues alternatively that the juvenile court's ruling should be upheld because the police officers were conducting an investigatory detention in connection with the minor's violation of curfew.[3] An officer may detain a person when "the circumstances known or apparent to the officer . . . include specific and articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is

[3] In connection with this argument, the Attorney General requests that this court take judicial notice of portions of the Anaheim Municipal Code. The Attorney General concedes that these materials were not presented to the juvenile court. The request for judicial notice is denied.

involved in that activity." (*In re Tony C.* (1978) 21 Cal.3d 888, 893.) Here, the juvenile court made an implied finding that the minor was not subject to an investigatory detention based on his possible curfew violation: "So I think the officers maybe had something *a little less than a reasonable suspicion* but they certainly had a reason to want to check it out, at least do a consensual encounter and find out what they are up to." (Italics added.) The court found that the officers were not conducting a detention of the minor, but rather a consensual encounter, before the minor dropped the spray paint can; this finding is amply supported by the facts.

II.

PITCHESS MOTION

On a showing of good cause, a criminal defendant is entitled to discovery of relevant documents or information contained within the confidential personnel records of peace officers accused of misconduct against the defendant. (*Pitchess, supra*, 11 Cal.3d at p. 535.) The trial court must review the requested records in camera to determine what information, if any, should be disclosed. (*Chambers v. Superior Court* (2007) 42 Cal.4th 673, 679.) A request for discovery of the peace officers' personnel records is committed to the discretion of the trial court; we review only to determine whether the trial court abused its discretion. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1039.)

The parties agree that this court should conduct an independent review of the sealed records of the in camera hearing to determine whether the juvenile court abused its discretion in denying the minor's motion for disclosure of the officers' personnel records. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1285 [reviewing courts "routinely independently examine[] the sealed records of . . . in camera hearings to determine whether the trial court abused its discretion in denying a defendant's motion for disclosure of police personnel records"].)

We have reviewed the sealed transcript of the in camera hearing and the list of confidential peace officer personnel records reviewed by the juvenile court, which was also filed under seal. The custodian of records, having been placed under oath, described the personnel files, supervisor's files, and internal affairs files that had been provided to the court, as well as the types of information that would be found in each. The court questioned the custodian of records about those records and directed the Anaheim City Attorney to prepare a list of documents in the internal affairs files for each of the four officers with the name of the officer, the date of the complaint, the nature of the complaint by reference to the Anaheim Police Department rule of conduct allegedly violated, and the outcome. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226, 1229 [the trial court is not required to place a photocopy of documents produced by the custodian of records in a confidential file, but may state for the record what documents it examined in camera].)

However, with one exception,[4] the transcript of the in camera hearing does not indicate that the juvenile court actually reviewed the documents in question. In essence, the court asked the custodian of records—an employee of the agency that employed the four peace officers whose records were being sought—if the files he had brought with him contained information that would be subject to disclosure to the minor and the minor's counsel. The custodian of records denied that the files contained any such information. Based on that representation, the court determined that the *Pitchess* motion should be denied.

We do not mean to imply that the custodian of records in this case was anything but completely honest in his assessment of whether the officers' files reflected any misconduct related to the issues raised by the minor's *Pitchess* motion. However, that assessment is the responsibility of the juvenile court, not the custodian of records.

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[4] At one point, the court stated: "The court has read this Anaheim Police Department Incident Investigation . . . ."

"[B]oth *Pitchess* and the statutory scheme codifying *Pitchess* require the intervention of a neutral trial judge, who examines the personnel records in camera, away from the eyes of either party, and orders disclosed to the defendant only those records that are found both relevant and otherwise in compliance with statutory limitations. In this manner, the Legislature has attempted to protect the defendant's right to a fair trial and the officer's interest in privacy to the fullest extent possible." (*People v. Mooc, supra,* 26 Cal.4th at p. 1227.)

The record before us does not show that the juvenile court itself determined whether the officers' personnel files contained discoverable information. The court abused its discretion in ruling there was no discoverable information in any of the officers' files. "The failure to exercise discretion is an abuse of discretion." (*Pratt v. Ferguson* (2016) 3 Cal.App.5th 102, 114.)

DISPOSITION

We reverse the order and remand the matter to the juvenile court to conduct a new *Pitchess* motion hearing. If, after conducting that hearing, the court determines that there is no information to disclose to the defense, the order shall be reinstated.

FYBEL, J.

WE CONCUR:

MOORE, ACTING P. J.

GOETHALS, J.